Supreme Court, U. S.
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In the Supreme Court of the United States.

OCTOBER TERM, 1975.

No. 75-73.

FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts;
GARRETT BYRNE, District Attorney of the County of Suffolk; the District Attorneys for all other Counties, their agents, successors, those acting in concert with them, and all others similarly situated,
APPELLANTS,

v.

WILLIAM BAIRD; MARY MOE; PARENTS AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Brief for the Appellants.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Brief for the Appellants.

Opinion Below.

The opinion of the district court is at 393 F. Supp. 847 (D. Mass. 1975).

Jurisdiction.

On April 28, 1975, the district court entered its order together with its opinion, declaring that the parental consent requirement of the statute violated the United States Constitution and enjoining the defendants from enforcing the provisions of the statute as it relates to parental consent. On May 9, 1975, the court entered a substitute order, nunc pro tunc, correcting a clerical error in the original order. A notice of appeal was filed with the district court on May 16, 1975 (A.J.S. 35-36). Appellants filed their jurisdictional statement on July 12, 1975. Probable jurisdiction was noted on November 17, 1975.

Jurisdiction of this appeal is conferred by 28 U.S.C. § 1253.

Statutes Involved.

The Massachusetts statute involved is Massachusetts General Laws, c. 112, § 12P, which, in cases of abortion, provides:

> (1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother.
>
> If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having

> duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient.
>
> (2) The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.
>
> Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve R.

Criminal penalties are imposed by M.G.L. c. 112, §§ 12N and 12Q, which provide:

> § 12N: Except in an emergency requiring immediate action no abortion may be performed under sections twelve I[1] or twelve J[2] unless
>
> (1) the written informed consent of the proper person or persons has been delivered to the physician performing the abortion as set forth in section twelve P and
>
> (2) if the abortion is during or after the thirteenth week of pregnancy it is performed in a hospital duly authorized to provide facilities for general surgery.

---

[1] Section 12I prohibits an abortion if the pregnancy has existed for less than twenty-four weeks unless "in the best medical judgment of a physician, the abortion is necessary under all attendant circumstances."

[2] Section 12J prohibits an abortion if the pregnancy has existed for more than twenty-four weeks unless it is "necessary to save the life of the mother, or if a continuation of her pregnancy will impose on her a substantial risk of grave impairment of her physical or mental health."

Except in an emergency requiring immediate action no abortion may be performed under section twelve J unless performed in a hospital duly authorized to provide facilities for obstetrical services.

§ 12Q: Any person who commits an act in violation of sections twelve L[3] or twelve M[4] shall be punished by a fine of not less than five hundred dollars nor more than two thousand dollars, or by imprisonment of not less than three months nor more than five years, or by both said fine and imprisonment. Conduct which violates sections twelve L or twelve M which also violates any other criminal laws of the commonwealth, may be punished either under this section or under such other applicable criminal laws. Any person who wilfully violates the provisions of sections twelve N or twelve O[5] shall be punished by a fine of not less than one hundred dollars nor more than two thousand dollars.

The text of the statute is found at pages 105-110 of the Supplement to Volume 17 of the Massachusetts General Laws Annotated (West Publishing Company, Supp. 1975).

[3] Section 12L regulates the abortion procedure performed under § 12J.

[4] Section 12M requires that a physician performing an abortion under § 12J take necessary steps to "preserve the life and health of the aborted child."

[5] Section 12O provides for the filing with the commissioner of public health certain information if an abortion is performed based upon the exceptions in § 12J.

Questions Presented.

Is the parental consent provision of M.G.L. c. 112, § 12P, unconstitutional under the Fourteenth Amendment to the Constitution of the United States?

Should the district court have joined the parents of Mary Moe I as parties necessary for a just adjudication and appointed a *guardian ad litem* to protect her interests?

Statement of the Case.

Prior Proceedings.

On August 2, 1974, the Massachusetts General Court enacted Chapter 706 of the Acts of 1974 which amended M.G.L. c. 112, by adding §§ 12H to 12R. The legislation was entitled "An Act to protect unborn children and maternal health within present constitutional limits." On October 31, 1974, one day prior to the effective date of the act, the plaintiffs commenced a class action in the United States District Court for the District of Massachusetts (A. 2, 9-18). The plaintiffs, and their respective classes, were as follows:

1. William Baird, a director and chief counselor of the Abortion Center operated by the Parents Aid Society, a corporation organized under the laws of Massachusetts.

2. Gerald Zupnick, M.D., the medical director of the Parents Aid Society Abortion Center. He sued on his own behalf and on behalf of his patients, other physicians similarly situated, and their patients.

3. Mary Moe I and Mary Moe II, both of whom alleged that they would be prevented from obtaining an abortion at the Parents Aid Society Abortion Center should Chapter 706

go into effect. They sued as well on behalf of all pregnant unmarried minors similarly situated.

4. Parents Aid Society, a not-for-profit corporation which operates the Parents Aid Society Abortion Center (A. 10, 11).

The defendants, appellants herein, were the Attorney General of the Commonwealth of Massachusetts and the District Attorney of Suffolk County. At a later date, the plaintiffs moved to join the district attorneys of the other Massachusetts counties as party defendants. This motion was allowed on December 9, 1974 (A. 40-42, 4).

The complaint claimed that M.G.L. c. 112, § 12P, denied the unmarried minor plaintiffs their right to privacy under the Constitution of the United States and this Court's decisions in *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973). In addition, the complaint alleged that unmarried minors were being denied the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution. The plaintiffs sought injunctive and declaratory relief enjoining the defendants from enforcing or implementing the parental consent requirement of M.G.L. c. 112, § 12P, and declaring that this section was unconstitutional (A. 9-15).

On the same day that the complaint was filed, United States District Judge Freedman temporarily restrained the enforcement of the statute and granted the plaintiffs' request for a three-judge court (A. 2).

The defendants filed a motion to dismiss and/or for summary judgment on the grounds that: the plaintiffs lacked standing; the action was not ripe for judicial review; the court should abstain; the plaintiffs failed to join parties pursuant to Fed. R. Civ. P. 19; and the plaintiffs failed to state a claim upon which relief could be granted (A. 22-23).

Jane Hunerwadel and other parents moved on November 19, 1974, to intervene in support of the statute on behalf of all parents in Massachusetts with unmarried minor daughters who are or may become pregnant. The motion was allowed on November 20, 1974 (A. 24-28, 3).

A hearing on the continuance of the temporary restraining order was held on November 14, 1974. The court continued the temporary restraining order in effect and scheduled a hearing on a preliminary injunction, which was later combined with the trial on the merits (A. 3, 6). Five expert witnesses in the fields of medicine and psychiatry testified for the parties. Also, Zupnick, Baird, and Hunerwadel testified on their own behalf. Mary Moe I testified *in camera* and her testimony was impounded[6] by the court to prevent discovery of her identity.

On April 28, 1975, a majority of the three-judge district court issued its order declaring § 12P and "such other portions of th[e] chapter insofar as they make specific reference thereto . . . to be unconstitutional and void" (A.J.S. 34). Senior District Judge Julian dissented. The majority ruled that the plaintiffs Mary Moe I, Parents Aid Society and Gerald Zupnick had standing to bring the action in their individual and representative capacities. As to plaintiff William Baird, the court did not find it necessary to rule on his standing because of the "unassailable standing of other plaintiffs" (A.J.S. 5). Of the numerous parents who were allowed to intervene as representatives of Massachusetts parents having unmarried minor daughters who are or might become pregnant, only Jane Hunerwadel testified and presented evidence. Accordingly, the court dismissed the complaint as to intervening parents and minor plaintiffs about whom no evidence was presented. The court also determined that a sufficient controversy existed based upon the following finding:

---

[6] Because the testimony was impounded, the transcript of her testimony has not been included in the joint appendix.

> We find that the subject of abortions has excited a great amount of feeling in Massachusetts; that the defendants, as is evident from their activities in this case, are satisfied that the statute is constitutional; that there will be extensive pressure upon them to prosecute in case of a violation, and that it is highly improbable that they would not immediately respond to such pressures. Baird testified that he had been arrested without warning in connection with the Massachusetts birth control statute, so-called, and we believe that public opposition to abortion is more organized and more vocal than was the opposition to birth control. (A.J.S. 7.)

The court made a number of findings in support of the plaintiffs' claim that the statute was facially invalid. In assessing the need for regulating abortions performed on minors, the majority found a low percentage of medical complications resulting from abortions. The court did recognize that guilt feelings following the abortion were possible. All experts agreed, and the court found, that "pregnancy in an unmarried minor is a period of great emotional stress; that support is needed, and that parental support, if forthcoming, is most desirable" (A.J.S. 9). However, the majority took a negative view of the probable reaction of parents to the pregnancy of their unmarried daughter. Despite the fact that Mary Moe's parents did not testify, nor did any other parents of pregnant unmarried minors, the court found "that an appreciable number [of parents] are not [supportive], for a variety of reasons . . . " (A.J.S. 9) and a "significant number of minors who are capable of consenting are unwilling to tell their parents" (A.J.S. 9-10).

The court stated that while the experts differed on the capacity of a minor to give an informed consent, "it is enough

for present purposes that we find that a substantial number of females under the age of 18 are capable of forming a valid consent" (A.J.S. 12).

The majority saw the ultimate issue in the case to be the resolution of the conflict between the minor's personal rights and the separate rights of the parents. Judge Aldrich invalidated the statute because, as he characterized it, § 12P recognized independent rights of parents (A.J.S. 13), in derogation of the fundamental privacy interest of the pregnant minor (A.J.S. 13, 15).

The findings of the dissent diverged significantly from the findings of the majority. Judge Julian took issue with the procedural defects in the proceedings. First, he saw a fundamental conflict in the fact that Mary Moe and the other plaintiffs were all represented by the same counsel. Adequate representation of the minor demanded that a *guardian ad litem* be appointed under Fed. R. Civ. P. 17(c). Second, Judge Julian believed that the parents of Mary Moe were necessary for a just adjudication, thereby requiring their joinder as parties under Fed. R. Civ. P. 19(a).

The most significant divergence was over the question of consent. The dissent stated:

> The majority find that Mary Moe was competent to make and effectuate the decision to abort. The majority also find there are other unmarried pregnant minors in Massachusetts who have adequate capacity to give a valid and informed consent to an abortion. These findings are not warranted by the evidence. (A.J.S. 24.)

Judge Julian concluded that § 12P is a valid exercise of the state's police power and its power as parens patriae which

recognizes parental rights and duties and protects pregnant minors against their own improvidence (A.J.S. 31-32).

The Attorney General filed a notice of appeal on May 16, 1975. Intervenor Jane Hunerwadel filed her appeal on May 20, 1975 (A. 8). On July 12, 1975, the appeal was docketed upon receipt of the Attorney General's Jurisdictional Statement. On November 17, 1975, this Court noted probable jurisdiction and ordered that the case be set for oral argument in tandem with Nos. 74-1151, *Planned Parenthood* v. *Danforth*, and 74-1419, *Danforth* v. *Planned Parenthood*.[7]

[7] In *Planned Parenthood* v. *Danforth*, No. 74-1151, the district court (C.D. Mo.) upheld a statute *inter alia* as follows:

> Section 3. No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:
>
> . . . . . .
>
> (2) After the woman, prior to submitting to the abortion, certifies in writing her consent to the abortion and that her consent is informed and freely given and is not the result of coercion.
>
> . . . . . .
>
> (4) With the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother. (House Bill No. 1211.)

If a physician fails to comply with the requirements of the statute, he will be guilty of a misdemeanor (§ 14). Unlike M.G.L. c. 112, § 12P, the Missouri statute does not require the consent of both parents. However, there is no express provision in the Missouri statute for judicial review as provided in M.G.L. c. 112, § 12P.

Facts.

The Statute.

Although the statute regulates the performance of abortion upon both minor and adult women,[8] the portion of the statute now under attack applies to pregnant females under the age of eighteen.[9] The statute imposes criminal penalties upon physicians who fail to obtain the informed consent of the proper persons prior to the abortion procedure. Section 12N provides that no abortion may be performed without the consent of the persons enumerated in § 12P. Section 12P requires the consent of the unmarried minor and her parents unless one parent has deserted the family. If both parents are unavailable, then the minor's guardian, or the person who has the care and custody of the minor, may consent to the procedure. If parental consent is refused, consent may be obtained from the Superior Court "for good cause shown."

The Role of Parents.

All experts agreed that parental involvement was desirable and would be beneficial to the emotional and physical well-being of the child (A. 63, 67 (Sturgis), 147 (Hodgson), 89, 92, 177, 180 (Nadelson), 317, 328 (Rivkind), 340, 350, 352 (Yerkes)). In most instances parents would support their daughter and work with the doctor in reaching a decision on whether to terminate her pregnancy (A. 65 (Sturgis), 156 (Hodgson)). The reluctance of minors to inform their parents

[8] The other portions of the statute primarily regulate abortions performed during the third trimester.

[9] The term "minors" applies to persons under the age of eighteen.

was attributable to either fear of punishment or other vindictive reactions (A. 181-182 (Nadelson)). (See Mary Moe testimony, pp. 134-135). The court found that some minors would be reluctant to inform their parents because of the distress the parents would experience on being informed of their daughter's pregnancy (A.J.S. 10). However, the minors' fears are mostly unfounded and, according to the testimony, the parents' predicted reactions seldom materialize (A. 65 (Sturgis), 148 (Hodgson), 182-183 (Nadelson), 343 (Yerkes)).

Informed Consent.

The witnesses disagreed strongly on the question of whether a minor was capable of consenting to an abortion. Plaintiffs Zupnick and Baird testified that they knew of *no* minors who were incapable of giving an informed consent (A. 213, 289). The expert witnesses were less definite on the question. All agreed that the younger patient was less capable of consenting and more in need of parental support (A. 79 (Sturgis), 150 (Hodgson), 342 (Yerkes)). Defendants' experts testified that, as a general class, seventeen year olds were not capable of giving informed consent (A. 316 (Rivkind), 342 (Yerkes)). An inherent problem in addressing the issue of informed consent was the uncertainty as to the precise definition of the term. Moreover, no statistical or other empirical evidence was presented on this question.[10]

[10] The experts testified uniformly that abortion is classified as a surgical procedure (A. 114-115 (Sturgis), 315 (Rivkind)).

Parents Aid Society.

The counseling and medical procedures at the Parents Aid Society Abortion Center were described by Zupnick and Baird at the trial. Upon entering the Center, the patients are given forms to be filled out prior to the operation (A. 217; Mary Moe testimony, pp. 139, 169; Ex. D). Counseling is done in groups comprised of minors and adults with no attempt to separate the two groups (A. 227). Although Dr. Zupnick is available (A. 202), the counseling is done by Baird and Nurse Morrissey (A. 229, 263). The counseling process is brief and is limited to a description of abortion procedures, possible complications and birth control techniques (A. 263; Mary Moe testimony, p. 141). The surgical procedure takes approximately ten minutes followed up with a brief examination of the patient in the recovery room (A. 239-240).

Summary of Argument.

The Court should hold the Massachusetts parental consent statute, M.G.L. c. 112, § 12P, facially valid under the Due Process Clause of the Fourteenth Amendment because it can be interpreted as a reasoned effort to preserve and protect diverse compelling state interests.

Appellants' first argument outlines the four interests advanced by § 12P's requirement that, prior to terminating the pregnancy of a minor, a physician must obtain the consent of both the minor and her parents. The State's first interest lies in supporting the family unit and in assuring that an abortion decision is guided by family members in the child's interest. The State's second interest is its concern for the well-being of its youth. The Legislature has determined that, because

children generally do not possess the capacity for mature judgment, reliance should be placed on parents to supplement a child's decision. The State's third interest is a separate but related concern that decisions specifically affecting health and welfare be made not by a physician alone but by those persons the State considers most worthy of its confidence. The special circumstances which often surround abortions performed on minors, including the fact that the physician is often a stranger to the child, support the State's judgment that parents have an essential role in the counseling and medical decision-making process. The statute promotes the State's fourth interest, that of protecting the minor's right of privacy, by providing for judicial review if parents refuse to consent to their child's abortion. State courts can use this power of review to make an independent assessment of the situation and protect the best interests of the child.

Appellants' second argument places § 12P within the context of established common law principles. These enduring principles provide guidance in determining the zone of permissible state action when fundamental interests in liberty are affected. Appellants show first that the statute has absorbed and refined the common law requirement that physicians obtain parental consent before performing surgery on a child. This requirement is a product of the basic perception that the parents' natural instinct to serve their children's needs surpasses that of any other person. The second common law principle reflected in § 12P is that of parens patriae, the notion that the state has both the authority and the responsibility to protect its citizens. This includes the power to adjust family relationships to advance the welfare of children. The statute's third common law element is its designation of state courts, acting as courts of equity, to review family decision-making to meet the needs of individual fact situations. Massachusetts courts have, in similar areas, developed two ap-

proaches for discharging this responsibility: a rule that a mature minor may obtain surgery without parental consent; and a doctrine that, regardless of parental desires, the best interest of the child must be pursued.

Appellants' third argument turns to the substantive principles set forth by this Court under the Due Process Clause of the Fourteenth Amendment. Of first importance is the Court's recognition that the interest of parents in the care and management of their children is a fundamental value encompassed by the Fourteenth Amendment. Second, the Court has held that the state's interest in the well-being of its youth justifies protective regulation of minors which would be inappropriate for adults. Third, principles of federalism demand that the federal courts exercise restraint in adjudicating facial challenges to state statutes. When a narrowing construction can be perceived which would preserve the statute's constitutionality, a federal court should provide the state an opportunity to impose the narrow interpretation and thereby preserve the law. Because the judicial review provision in § 12P can be administered within narrow, constitutional limits, the Court should reverse the decision of the district court and hold § 12P constitutional on its face.

Argument.

I. The District Court's Finding of Facial Invalidity Should be Reversed Because the Statute can be Interpreted as a Reasoned Effort to Preserve Diverse Fundamental Interests.

The district court found M.G.L. c. 112, § 12P, facially invalid on the theory that the statute subordinated the privacy

interest of a pregnant minor to the competing interests of her parents. The court assumed, without specific illustrations,[11] that some parents would vindictively prohibit their children's termination of pregnancy. Further, the statute's explicit provision for state court intervention in such circumstances failed to influence the majority. State courts would be obliged, the court found, to side with the parents, ignoring the child's own best interest. Finally, the court expressed skepticism concerning the motives of the Legislature and intimated that the statute was impelled by controversial moral notions rather than other, more objective interests.

These findings are unwarranted. They give no credence to the basic role of the family in our society. They pay no respect to the presumption — rooted in concepts of federalism and separation of powers — that state courts and legislatures respect the Constitution and are likely to conduct themselves according to its requirements. Taken together, they are as much at variance with constitutional principles as with our society's collective experience from which such fundamental concepts are built.

Section 12P, if analyzed dispassionately, represents an attempt by the Legislature to weave together interests that are worthy of the Court's respect. These interests are four in number. First, the statute promotes the interest of the State in supporting the family unit and in assuring that a minor's decision to have an abortion is guided by family members, in the child's interest.[12] If the concept of the family is fundamental in our system, then it is for fundamental decisions such

[11] The entire testimony offered by the plaintiffs on this issue is found at A. 191-192.

[12] See discussion in Parts II, A, and III, A, *infra*, and *Wisconsin* v. *Yoder*, 406 U.S. 205, 232 (1972); *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972); *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944).

as the minor's abortion that the need for family should be called into play. The statute underscores the value of the family and aids in the "discharge of family responsibility"[13] by requiring that a physician obtain parental consent before terminating a minor's pregnancy.

The second interest that the State seeks to further in § 12P is its well-recognized and long-respected interest in the "well-being of its youth."[14] In certain areas states have determined that a child is not possessed of the "full capacity for individual choice which is the presupposition of [fundamental constitutional] guarantees."[15] Sometimes, the permissible result is the denial of a basic right — such as the right to vote.[16] In contrast, in § 12P, the State imposes no such substantive prohibition. Rather, it places first reliance on the parents to supplement the child's determination, to assure that the final decision of the child is one informed by those whose knowledge of her capacity is the product of a lifetime relationship.

The State's third interest is in allocating decisions concerning health and welfare to those it considers, under all the circumstances, most worthy of its confidence. Without this statute the abortion decision would lie between a minor and the physician she approaches for an abortion, usually not the family doctor but a stranger. The State here has determined that for a pregnant minor, unlike an adult, counseling and decision-making by strangers are more subject to serious miscalculations. The doctor's review alone may be insufficient,

[13] *Ginsberg* v. *New York*, 390 U.S. 629, 640 (1968).

[14] See discussion in Parts II, B, and III, B, *infra*, and *Ginsberg* v. *New York*, *supra*; *Prince* v. *Massachusetts*, *supra*, at 167, 168, 169.

[15] *Ginsberg*, *supra*, at 650 (Stewart, J., concurring).

[16] See *Oregon* v. *Mitchell*, 400 U.S. 112, 295, n. 14 (1970) (opinion of Stewart, J.).

and consequently the State has decided to give greater credence to parental consent than to a physician's assent. Appellants believe that the record created by plaintiffs, portraying the perfunctory circumstances surrounding the multiple abortions performed by plaintiff Zupnick, strongly supports the State's judgment.[17]

The fourth and final fundamental interest is found in the statute's provision for judicial review. It is the preservation of the pregnant child's interest in having an abortion. The first three interests described above seek to structure the decision process to assist the child in her decision. However, the most sensitively built process may fall short; in such circumstances the independent privacy interest of a pregnant female must be afforded protection. Thus, the Legislature, recognizing that dispute may be inevitable between certain parents and their child, has provided for the intervention of a judge of the state Superior Court. If permitted to operate, defendants believe that these state courts would fashion a system of review to serve the best interests of the child. The state court's history in comparable areas supports such a prediction, for, on their own, Massachusetts courts have already modified parental consent at common law to give recognition to the needs of children.[18]

The combining of these interests in a single law is an enormous undertaking. Great sensitivity will be required of parents, judges, and most of all physicians, to whom the statute is principally speaking. Whether in practice the chosen mechanism will work, appellants, the district court, and this Court can only speculate. Appellants submit that specula-

[17] See pp. 35-39 *infra*.

[18] See Parts II, C, and III, C, *infra*.

tion provides an inadequate foundation for a finding of facial unconstitutionality.

The district court, however, expressed its personal judgments about these matters, undeterred by the absence either of actual statutory practice or well-grounded legislative facts.[19] First, the court found that some parents would be unsupportive, to the contrary, would be vindictive and thus inappropriate participants in the abortion decision:

> We are obliged to find . . . that an appreciable number [of parents] are not [supportive] for a variety of reasons. Moreover, as may be the case with Mary Moe's father, parents may seek to control sexual behavior by threats that they do not mean, or would not carry out in the actual eventuality, but which nonetheless serve to destroy intercommunication. . . .
>
> . . . . . .
>
> We must find . . . that a significant number of minors who are capable of consenting are unwilling to tell their parents, either because they correctly fear what would happen to themselves, or, although they would expect support from their parents in one sense, they know their parents would under no circumstances consent to the abortion they wish, or, because of their views on illegitimacy and the stigma attaching to unmarried mothers, would attempt to make them enter into a marriage they do not want.
>
> . . . . . .

[19] The "legislative facts" offered by plaintiffs were limited in scope, consisting entirely of the testimony of three expert witnesses. This Court, however, may look beyond this testimony in considering legislative facts. *See* Weinstein and Berger, Weinstein's Evidence, vol. 1, ¶200[03] (1975). Recognizing the Court's power to take such judicial notice, appellants offer legislative facts throughout the brief to support the statute's constitutionality.

> . . . We accept the testimony of plaintiffs' experienced experts that some parents would insist upon the continuance of the pregnancy simply as punishment, or to teach a lesson. . . . (A.J.S. 9-10.)

These judgments were made without any testimony from Mary Moe's parents or from other parents who had actually participated in such decisions with their children. Nor was any documentation offered that parents in fact refuse consent for selfish or misguided reasons. The testimony offered on these matters is conjectural at best and a slim basis for the global conclusions on family matters drawn by the court.[20]

Next, the district court intimated its view as to the motives of the Legislature which enacted M.G.L. c. 112, § 12P, stating:

> [W]e . . . recall that the Commonwealth itself argued in *Baird* v. *Eisenstadt,* 1 Cir., 1970, 429 F. 2d 1398, 1401, *aff'd,* 405 U.S. 438, that the prevention of fornification is so important that it justified withholding birth control devices from unmarried adults, with the resultant risk of pregnancy. The fact that the Court of Appeals expressed shock at this view does not mean it does not exist, but merely illustrates the degrees of variance and the strength of opinions on this subject. (A.J.S. 10.)

Judge Aldrich thus imputed to the current statute the legislative motives that prompted the ill-considered statute in

[20] For further discussion of the experts' testimony, to the effect that parental support is important to the well-being of the pregnant child, see pp. 42-43, n. 34, *infra.*

Eisenstadt v. *Baird.* This presumptive condemnation of a statute based upon past legislative judgments is unjustified. To the contrary, each statute must come to court carrying a strong claim for judicial respect. That respect is notably absent in the opinion of the district court.

As a third reason for its judgment the court found that there is no "magic" to the eighteenth birthday in requiring parental consent:

> [I]t is enough for present purposes that we find that a substantial number of females under the age of 18 are capable of forming a valid consent. (A.J.S. 12.)

This finding obviously influenced the outcome below. The court looked with disfavor upon what it viewed as an irrebuttable presumption in § 12P that minors lack the capacity for informed consent. However, it neglected to analyze whether the statute was likely in practice to restrain the exercise of that valid consent by mature pregnant minors. As subsequent sections of this argument establish, the growth of the "mature minor" rule at common law represents a direct and conscious recognition by courts of the capacity of certain minors for autonomous decision-making. Using this rule a Superior Court judge might well find "good cause" for respecting the minor's wishes, independent of the views of her parents.

The majority opinion gave short shrift to the possibility that this or other standards of judicial review could preserve the statute's constitutionality; its treatment of the statute's judicial review provision was relegated to a footnote:

> The dissent is seemingly of the opinion that a reviewing Superior Court judge would consider only the interest of

> the minor. We find no room in the statute for so limited an interpretation. (A.J.S. 14.)

Later, the majority characterized the judicial review provision as merely "a constraint on the assertion of unreasonable claims of the parents" (A.J.S. 15).

Both the mature minor rule and the "child's best interest" doctrine[21] would, in practice, channel the court's review within the bounds of constitutionality. Given these well-established standards the district court's unwillingness to provide the state court an opportunity to apply the law offends deep-seated values of federalism. As this Court recently noted in a case touching fundamental First Amendment interests:

> [W]hen considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program. . . . [A] state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts. . . . *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 216 (1975).

It may well be true that statutes in other states requiring parental consent lack the realistic basis for a narrowing construction, because they have no provision for judicial review. *See, e.g., State* v. *Koome*, 84 Wash. 2d 901, 916-917, 530 P. 2d 260, 269-270 (1975) (Finley, J., concurring). By contrast, the potential for flexible statutory construction is

[21] See Part II, C. *infra.*

provided here by the explicit interjection of the state court on behalf of the child. This provision militates for reversal of the district court's finding of facial invalidity.

The final supporting prop in the district court's decision is its portrayal of the statute as cast exclusively in terms recognizing rights of parents independent of their children. Thus, the question the majority addressed was whether "parents possess, apart from right to counsel and guide, competing rights of their own?" (A.J.S. 15).

In subsequent sections appellants clarify what the court below refers to as "competing rights" of parents.[22] Briefly, appellants believe that the rights of parents independent of the child, while flexible, are always dependent upon the interests of the child. On limited occasions, not here relevant, competing parental demands may permit judgment about a child's life that would be inappropriate if the child's best interest *alone* were the basis for judgment.[23] However, it is plain that when a fundamental matter such as termination of pregnancy is at stake, the parents may not properly consider a factor external to the child's own interests. In this situation the "competing" parental right consists exclusively of the right to assess independently, for their minor child, what will serve that child's best interest. The parents' right here is a function of their greater relative capacity for judgment. However, in operation, the parents' actual deliberation must range no further than would that of a pregnant adult making her own abortion decision.

[22] See Parts II, A, C and III, A, C, *infra.*

[23] One example is parental judgments dictated by competing demands for resources to serve the needs of a large family. *Cf. Libby* v. *Arnold*, 161 N.Y.S. 2d 798, 799-800 (Dom. Rel. Ct. 1957); *Meek* v. *Meek*, 318 S.W. 2d 851 (Ky. 1958).

Viewed in this light, the statute does not give parents a "veto" over their child's abortion. Nor does the statute subordinate the child's interest to "parents' independent rights [that] remain formidable" (A.J.S. 15). Rather, the statute can, and should at this point, be interpreted as recognizing the many dimensions of the pregnant minor's plight. The four interests this statute may be deemed to serve are worthy of this Court's respect. The state courts should be given the opportunity to show that these legislative efforts can be sensitively implemented in a manner which is faithful to constitutional principles.

II. The Statute Codifies the Traditional Common Law Requirement of Parental Consent and is Based on Principles Designed to Protect the Best Interests of Minors and Preserve the Institution of the Family. These Principles Merit Constitutional Recognition.

In *Roe* v. *Wade*, 410 U.S. 113, 153 (1973), this Court expressed its feeling that the right of privacy — including a woman's decision whether or not to terminate her pregnancy — is "founded in the Fourteenth Amendment's concept of personal liberty." The Court thus accepted openly the idea that the Due Process Clause possessed a substantive content not "limited by the precise terms of the specific guarantees elsewhere provided in the Constititution." *Roe* v. *Wade*, 410 U.S. at 169 (Stewart, J., concurring). In Justice Stewart's words, these concepts of liberty constitute a "rational continuum." *Ibid.* They "were purposely left to gather meaning from experience." *Ibid.*, quoting Frankfurter, J., in *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (dissenting opinion).

One source for evaluating the contours of the concept of personal liberty is the common law. *See Roe* v. *Wade*, 410 U.S. at 132-141. This vast body of judicial experience, shaped by principles which have endured centuries of change and growth, can provide the Court with a sound framework for evaluating the weight of the interests pursued in M.G.L. c. 112, § 12P.

Modern American society depends heavily upon the common law for the fabric of its rules regulating relations among family members and between the family and the state. Specifically, the courts have fashioned three pertinent doctrines: a requirement that physicians obtain parental consent before performing surgery on a child; a responsibility on the part of the state as parens patriae to promote the welfare of its citizens; and a supervisory capacity in courts of equity to review family decision-making and adjust common law rules to meet the needs of individual fact situations. M.G.L. c. 112, § 12P, combines these three approaches to produce a regulatory scheme which, if permitted to operate, would absorb the common law tradition of reshaping legal requirements governing family relationships in light of changing social preferences.

The principal characteristics of the pertinent common law tradition deserve brief review.

A. *The Statute Absorbs and Refines the Common Law Requirement that a Physician Obtain Parental Consent Before Performing Surgery upon a Minor.*

Mr. Justice Cardozo, in an oft-quoted sentence written as a member of the New York Court of Appeals, stated the traditional common law rule requiring a patient's consent to medical procedures: "Every human being of adult years and sound mind has a right to determine what shall be done with

his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages . . . [citations omitted]." *Schloendorff* v. *Society of New York Hospital*, 211 N.Y. 125, 129-130, 105 N.E. 92, 93 (1914). This well-established requirement is grounded both in fundamental tort notions concerning individual autonomy and bodily integrity and in established contract principles. *See, e.g., Canterbury* v. *Spence*, 464 F. 2d 772 (D.C. Cir. 1972) (action based upon failure of surgeon to secure informed consent of minor's mother); *Hawkins* v. *McGee*, 84 N.H. 114, 146 A. 641 (1929) (action for breach of contract by surgeon); *Wall* v. *Brim*, 138 F. 2d 478 (5th Cir. 1943) (operation performed without consent is a technical battery; consent creates a contract limited to extent of consent given); *see generally*, Waltz and Scheuneman, Informed Consent to Therapy, 64 Nw. U.L. Rev. 628 (1970).

The decision to consent to medical treatment is often a difficult one since it requires an evaluation of risks and benefits determined on the basis of specialized knowledge with which most patients are unfamiliar. Nevertheless, the courts have strictly enforced a physician's duty to obtain effective or "informed" consent, largely out of a recognition of the fundamental importance of the principle articulated by Cardozo. *E.g., Canterbury* v. *Spence, supra*, at 780; *Cobbs* v. *Grant*, 8 Cal. 3d 229, 245, 502 P. 2d 1, 11 (1972) (" . . . patient's right of self-decision is the measure of the physician's duty to reveal . . . "). Recognizing that minors are generally incapable of making such difficult decisions, the common law of both torts and contracts preserves society's desire to protect a minor's individual autonomy and bodily integrity by requiring the consent of capable persons, usually parents, to medical procedures performed on a child. *Bonner* v. *Moran*, 126 F. 2d 121, 122 (D.C. Cir. 1941); *see Ballard* v. *Anderson*, 4 Cal. 3d 873, 878, 95 Cal. Rptr. 1, 4 (1974) (parental consent is

traditionally required for medical services to minors because "minors may disaffirm their own contracts to acquire such services"); *see generally* Wadlington, Minors and Health Care: The Age of Consent, 11 Osgoode Hall L.J. 115 (1973).

The law reposes this authority with a child's parents because experience has shown that their natural instinct to care and nurture surpasses the interest of any other person in advancing the child's welfare. 1 W. Blackstone, Commentaries Ch. 16 (natural duty of parents to maintain their children, while enforced by laws, is best guaranteed by "Providence . . . by implanting in the breast of every parent that natural or insuperable degree of affection . . . " which neither individual parent's depravity nor rebellious children can totally extinguish); *In re Agar Ellis*, 24 Ch. D. 317, 329 (1883) (Cotton, L.J., concurring: court's determination of child's best interests must have "regard to the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice . . . "); *In re Hudson*, 13 Wash. 2d 673, 126 P. 2d 765 (1942) (parents have paramount right to decide questions affecting the welfare of their children unless their right is forfeited by neglect). Four aspects of this common law tradition are particularly relevant to the case at hand. First, the well-established view is that the nature of the specific procedure in question is irrelevant to the patient's right to grant or withhold "informed consent." Second, the common law leaves unsettled the question of whether one or both parents are to give consent on behalf of a child. Third, parents have certain obligations to their children which govern their granting or withholding of consent. Fourth, the allocation of decision-making power to parents is not absolute.

Performance of a medical procedure involving an invasion of the body is a battery at common law unless informed consent of the patient is secured. *Reddington* v. *Clayman*, 334 Mass. 244, 134 N.E. 2d 920 (1956); *Canterbury* v.

Spence, supra. It makes no difference whether the procedure is serious or routine, necessary or elective, innovative or well-established. Among the important policies which justify this strict rule is a desire to provide protection against the unknowing assumption of risks inherent in virtually any invasion of the body. In this regard, few decisions rival the difficulty of the determination to undergo abortion surgery. The essential result of an abortion is the truncation of the natural reproductive process. This interruption is troublesome for many people in our society. It has a variety of philosophical and religious implications that as yet are imperfectly understood by scholars and religious thinkers. *See, e.g.,* Hare, Abortion and the Golden Rule, 4 Philosophy and Public Affairs 201 (1975); The Rights and Wrongs of Abortion (M. Cohen, T. Nagel, and T. Scanlon, ed., Princeton 1974). Regardless of its legal status, the abortion decision unavoidably involves a concern for life and a realization of the finality of death. Few human beings make more serious decisions.

First trimester abortion surgery also involves physical risks and may have serious emotional and psychological consequences requiring competent professional assistance. These risks are usually deemed acceptable by medical standards. They nonetheless are undeniably real, and § 12P adopts the common law's principle of requiring physicians to obtain a patient's informed consent in order to assure that minors realize the possible consequences of abortion surgery. *See Canterbury* v. *Spence, supra.* [24]

[24] Indeed, the statute, recognizing the difficulty of the abortion decision, increases the legal protection of minors. At common law, since the consent of a minor to a medical procedure was ineffective, physicians were under no compulsion to secure it, but rather dealt only with the parents. *In re Seiferth,* 309 N.Y. 80, 87, 127 N.E. 2d 820, 824 (1955) (Fuld, J. dissenting); *In re Sampson,* 65 Misc. 2d 658, 317 N.Y.S. 2d 641 (Ulster Cnty. Fam. Ct. 1970) (quoting with approval Judge Fuld's dissent in *Seiferth*), *aff'd,* 29 N.Y. 2d 900, 278 N.E. 2d 918 (1972); *see In re Hudson,* 13 Wash. 2d 673, 709-710, 126 P. 2d 765, 782 (1942) (decision to permit minor to undergo surgery is responsibility of parents). Although most physicians may make a practice of securing patient consent regardless of legal effectiveness, *see* Baron et al., Organ and Tissue Transplants from Minor Donors in Massachusetts, 55 B.U.L. Rev. 159 (1975), certainly some physicians do not, and perform procedures upon patients who have not agreed to them. Section 12P effectively forecloses the possibility of a physician's performing an abortion upon a minor without first securing her consent *as well as* that of her parents. The requirement in § 12P that a physician obtain the consent of a minor before performing an abortion thus works a salutary change in the common law.

Finally, § 12P, like the common law rule, places the burden of compliance upon those best able to obey it — medical personnel — and not upon the child herself. Experience has demonstrated that a strict allocation of the burden is necessary because most patients are unable to appreciate the ramifications of medical services without careful explanation by trained personnel. Absent potential legal sanctions, some physicians may not adequately help patients develop a satisfactory understanding. *See, e.g., Canterbury* v. *Spence, supra.*

The second pertinent aspect of the common law tradition is its changing attitude toward the adequacy of the consent of one parent where both have custody of the child. Although originally at common law the father's consent alone was adequate to authorize conduct affecting a child, modern decisions reflect the current view that both the father and mother should share equally in making decisions affecting their children. *Compare* 1 W. Blackstone, Commentaries Ch. 16, *and Barry* v. *Sparks,* 306 Mass. 80, 27 N.E. 2d 728 (1940), *with In re Rotkowitz,* 175 Misc. 948, 951, 25 N.Y.S. 2d 624, 627 (N.Y.C. Dom. Rel. Ct. 1941) (court authorized operation consented to by mother and opposed by father); *see* M.G.L. c. 201, § 5 (parents share custody of child "jointly" unless

found unfit). The situation at common law in Massachusetts, while somewhat uncertain, appears to be that physicians must obtain the consent of both parents if they are available and no emergency exists. *Cf. Reddington* v. *Clayman*, 334 Mass. 244, 246-247, 134 N.E. 2d 920, 921-922 (1956) (battery action against surgeon by parents for unauthorized removal of tissue during tonsillectomy suggesting consent of both parents required). The *Reddington* opinion was construed in an Attorney General's opinion (1966 Op. A.G. 247) rendered to the Commissioner of Mental Health concerning proposed surgery on incompetents. The Attorney General stated that, "[i]f a patient has not attained his majority and is unmarried, the consent of his parents, as natural guardians, is necessary . . . [citations omitted]. If either parent is dead, the permission of the surviving parent should be sufficient. . . ." *See also* M.G.L. c. 201, § 5.[15] While courts in other jurisdictions have sometimes suggested *sub silentio* that the consent of a single parent may be sufficient at common law, *see, e.g., In re Hudson*, 13 Wash. 2d 673, 677, 126 P. 2d 765, 768 (1942), § 12P resolved ambiguity on the point in Massachusetts by stating explicitly that physicians must obtain the consent of both parents before proceeding with abortion surgery on a child.

The third common law principle embodied in § 12P is that parental authority over a child and the derivative duty of a physician to seek parental consent before performing surgery are premised on the parents' obligation to act in their child's best interests. The trust the common law thus imposes upon parents is one of long standing. *See* 1 W. Blackstone, Commentaries Ch. 16 ("*power* of parents over their children is derived from . . . their duty . . . to provide for their maintenance . . . " [emphasis in original]); *Wellesley* v. *Wellesley*, 4 Eng. Rep. 1078 (H.L. 1828) (in affirming action of Court of Chancery depriving father of custody of his children on the basis of his adulterous conduct, Lord Redesdale asked rhetorically: "Why is the parent entrusted with the care of his children? Because it is generally supposed he will best execute the trust reposed in him . . . "); and *Purinton* v. *Jamrock*, 195 Mass. 187, 201, 80 N.E. 802, 805 (1907) ("The right of the parents is not an absolute right of property, but is in the nature of a trust reposed in them, and is subject to their correlative duty to care for and protect the child . . . ").

[15] The practice of some hospitals seems to require consent of both parents. *See* Baron et al., *supra*, note 24.

Section 12P implicitly adopts this common law principle that parents must exercise their authority to promote their children's best interests and applies it specifically to family decision-making concerning a child's abortion. Any other interpretation of the statute would place it squarely in contradiction with a legal tradition which antedates the founding of the Commonwealth and has been forcefully reiterated by the Supreme Judicial Court from early years to present day. *Commonwealth* v. *Hammond*, 27 Mass. (10 Pick) 274 (1830), *cited in Curtis* v. *Curtis*, 71 Mass. (5 Gray) 535, 537 (1856) (Shaw, C.J.: "This is not a question of mere property — whether the mother . . . is entitled to the earnings of the minor. But the interest of the minor is the principal thing to be considered . . . [citations omitted]"); *Richards* v. *Forrest*, 278 Mass. 547, 553, 180 N.E. 508, 511 (1932) ("It has been said that the first and paramount duty of courts is to consult the welfare of the child. To that governing principle every other public and private consideration must yield . . . "); *Wilkins* v. *Wilkins*, 324 Mass. 261, 262, 85 N.E. 2d 768, 769 (1949) ("In determining whether parents are unfit, the most important consideration is whether the welfare of the child would be served by custody in them or in a guardian . . . "); *In re Kauch*, 358 Mass. 327, 264 N.E. 2d 371 (1970) (rule of *Wilkins* cited with

approval). A legislative intention to work such a drastic change in the Commonwealth's established law should not be lightly inferred. See *Corcoran* v. *S.S. Kresge Company*, 313 Mass. 299, 303, 47 N.E. 2d 257, 258-259 (1943) (" . . . statutes . . . made in derogation of the common law are to be construed strictly . . . ").

Finally, the law's authorization of parents to make decisions on behalf of their children is not absolute but rather subject to review and adjustment by the state. The refusal of the common law to permit parents to act as the final arbiter of their children's best interests is a corollary of the theory that the parents have a duty as trustees of their welfare. *Richards* v. *Forrest*, *supra*. This common law doctrine, discussed in the next section, is referred to as parens patriae; it enables the state to impose limits on the freedom of parents to make decisions on behalf of their children. *See Wellesley* v. *Wellesley*, 4 Eng. Rep. 1078, 1081 (H.L. 1828) (equity courts exercise a " . . . right which devolves to the Crown, as *parens patriae*, and it is the duty of the Crown to see that the child is properly taken care of . . . ").

B. *The Common Law Requires the State, as Parens Patriae, to Advance the Best Interests of Minors Facing Abortion Decisions.*

The doctrine of parens patriae, the notion that the state is the legal parent of its citizens, found early expression in guardianship cases decided by English common law courts. *See, e.g., Eyre* v. *Shaftsbury*, 24 Eng. Rep. 659, 664 (Ch. 1722) (" . . . King is bound of common right, and by the laws to defend his subjects . . . "); *Wellesley* v. *Wellesley*, 4 Eng. Rep. 1078 (H.L. 1828) (power of Court of Chancery, recognized for over 150 years, to promote best interests of minors on

King's behalf as parens patriae is not open to question). Blackstone traces the doctrine back to Fitzherbert's Naturia Brevium, 3 W. Blackstone, Commentaries *427, a source which Story characterizes as "a very ancient work of great authority . . . "; 2 Story, Equity Jurisprudence *666. Story also considered the power well-established; *id.* at 672. The doctrine received perhaps its best known constitutional recognition in this country in *Prince* v. *Massachusetts*, 321 U.S. 158 (1944). See pp. - , *infra*. It is now a well-established component of both our common and constitutional law. *In re Hudson*, 13 Wash. 3d 673, 696-697, 126 P. 2d 765, 777 (1942); *People* v. *Labrenz*, 411 Ill. 618, 623-624, 104 N.E. 2d 769, 773 (1952) (parens patriae responsibility of government is a source of equity jurisdiction "of ancient origin"); *Morrison* v. *State*, 252 S.W. 2d 97 (Mo. 1952) (traces parens patriae responsibility to Aristotle); *Jehovah's Witnesses in the State of Washington* v. *King County Hospital*, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd citing Prince*, *supra*, 390 U.S. 598 (1968); *see Richards* v. *Forrest*, 278 Mass. 547, 180 N.E. 508 (1932); *In re Clark*, 21 Ohio Op. 2d 86, 90, 185 N.E. 2d 128, 132 (C.P. Lucas Cnty. 1962) (child is a citizen of the state and state's chief duty is to protect " . . . right to live and to grow up with a sound mind in a sound body, and to brook no interference with that right by any person or organization . . . "); *In re Sampson*, 317 N.Y.S. 2d 641 (Ulster Cnty. Fam. Ct. 1970), *aff'd*, 29 N.Y. 2d 900, 278 N.E. 2d 918 (1972).

Under the doctrine of parens patriae, a state may make a variety of adjustments in a family relationship. It can require children to attend school,[26] receive vaccinations,[27] and postpone marriage.[28] It can remove a neglected child, either

[26] *State* v. *Bailey*, 157 Ind. 324, 61 N.E. 730 (1901).

[27] *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905).

[28] *See Parton* v. *Hervey*, 67 Mass. (1 Gray) 119 (1854).

temporarily or permanently, from its parents' custody. *In re Sampson, supra; In re Kauch*, 358 Mass. 327, 264 N.E. 2d 371 (1970) (interpreting M.G.L. c. 201, § 5). It can intervene in the management of the family to assure that parents support their children. *Richards* v. *Forrest, supra.* It can review parental judgments which risk one child for the benefit of another. *Nathan* v. *Farinelli*, 1974 Ins. L.J. 411 (Mass. Sup. J. Ct., July 3, 1974). And it can overturn parental judgments which are contrary to a child's best interests. *In re Sampson, supra; In re Clark, supra.*

The Massachusetts Supreme Judicial Court, recognizing the awesome authority this power represents, has erected a clear beacon to guide judges in its use. In the context of family relationships, the state must use its parens patriae power to advance the welfare of children. *Dumain* v. *Gwynne*, 92 Mass. (10 Allen) 270, 271-272 (1865) (adopting English rule that test of proper exercise by equity court of parens patriae power is the welfare of children); *Richards* v. *Forrest, supra,* at 553; *In re Kauch, supra.* Section 12P should be read as an effort to effectuate this well-established parens patriae doctrine.

C. *The Judicial Review Provision of § 12P Adopts a Proven Approach Protecting the Best Interests of Minors.*

Having established the requirement that physicians obtain parental consent before performing abortion surgery on a minor, the Legislature went on to provide for its supervision and control by the Superior Court. Implicit in this arrangement, based directly on the common law, is the notion that parental decisions which do not further a child's best interests should not be allowed to stand. *See Wellesley* v. *Wellesley*, 4 Eng. Rep. 1078 (H.L. 1828); *Dumain* v. *Gwynne, supra;*

Nathan v. *Farinelli, supra; People* v. *Labrenz*, 411 Ill. 618, 104 N.E. 2d 769 (1952); *In re Sampson, supra.* This supervisory role is one with which the courts of the Commonwealth, perhaps more so than any other state, have gained substantial experience. In particular, Massachusetts courts have had to address the problems associated with authorizing surgery on minors. *See generally, Nathan* v.*Farinelli, supra;* Curran, A Problem of Consent: Kidney Transplantation in Minors, 34 N.Y.U.L. Rev. 891 (1959); Baron et al., Organ and Tissue Transplants from Minor Donors in Massachusetts, 55 B.U.L. Rev. 159 (1975). The explicit provision of judicial review in § 12P assures that adjustments can be made to meet the needs of individual fact situations.

The district court, however, concluded that this provision is designed to protect parental interests irrespective of the best interests of a pregnant child (A.J.S. 13-14, esp. n. 10; but see Julian, J., dissenting, A.J.S. 31). This interpretation neglects the proven approach the Commonwealth's courts have developed at common law to protect the best interests of minors.

English courts of chancery were the King's administrators of his parens patriae power to protect the welfare of children. *Wellesley* v. *Beaufort*, 38 Eng. Rep. 236, 244 (1827). The Commonwealth's equity courts, along with most other state courts, inherited this authority from their English counterparts. *Dumain* v. *Gwynne*, 92 Mass. (10 Allen) 270, 271-272 (1865); *see, e.g., In re Hudson*, 13 Wash. 2d 673, 126 concomitant of this reception of common law in Massachusetts is the rule that the parens patriae power must be used to further the welfare of children. *Dumain* v. *Gwynne, supra;* see pp. 32-34, *supra.* The Massachusetts courts have developed two complementary approaches to discharging this responsibility: (1) a flexible version of the "mature minor" rule and (2) a willingness to assure independently the best

interest of the child. Section 12P should be read with these related approaches in mind.

The mature minor rule appears to have developed as a natural part of the exercise of equity jurisdiction. The recent growth of the rule in the context of surgical cases[29] has been characterized as a judicial response to the harshness of requiring parental consent for all medical treatment performed

[29] The rule originated in custody proceedings. There, it has involved a two-step judicial process of eliciting the views of an older child and then reaching a decision, based upon those views, as to the child's best interests. Thus, in a habeas corpus proceeding concerning custody of a sixteen-year-old child, Chief Justice Shaw first interrogated the minor as to her wishes and then began his opinion by stating:

> This is not a question of mere property — whether the mother or Fairbank is entitled to the earnings of the minor. But the interest of the minor is the principal thing to be considered . . . [citations omitted]. *Curtis* v. *Curtis*, 71 Mass. (5 Gray) 535, 537 (1856).

Custody cases are different from surgical procedure cases because, while the welfare of the child is the standard for judicial decision in both, surgical procedures, particularly abortions, affect a child's immediate physical well-being. Further, the mature minor rule would appear to have readier application in surgery situations than in custody disputes. Consent in surgery is primarily related to maturity of judgment. In comparison, issues relating to custody reflect fundamental concepts of social organization and long-term welfare, and consequently maturity of children may play a more limited role. *Compare Younts* v. *St. Francis Hospital and School of Nursing, Inc.*, 205 Kan. 292, 469 P. 2d 330 (1970) (mature minor rule applied to surgery involving seventeen-year-old), *with In re Kauch*, 358 Mass. 327, 329, 264 N.E. 2d 371, 373 (1970) (in custody proceeding involving sixteen- and twelve-year-old boys, children's preference for custody by aunt disregarded in favor of father's claim at common law and under M.G.L. c. 201, § 5). It is not surprising, therefore, that the mature minor rule has found widespread use in cases involving the authorization of surgery upon minors.

on minors. Wadlington, Minors and Health Care: The Age of Consent, 11 Osgoode Hall L.J. 115 (1973). The rule permits judges to make an independent appraisal when physicians under nonemergency circumstances propose to provide minors with medical care without the consent of their parents. The court determines whether the child is capable of giving effective "informed" consent. In these cases, the rule amounts to judicial recognition that the safeguard of parental consent is not required when the minor's decision is maturely reached. Wadlington, *id.* at 117-119. In Massachusetts the Supreme Judicial Court took precisely this approach in approving a seventeen-year-old minor's nontherapeutic donation of bone marrow by finding that the proposed donor was " . . . capable of consenting to the proposed procedure so as to prevent the creation of liability therefor." *Rappeport* v. *Stott*, Civil No. J 74-57 (Mass. Sup. J. Ct., Aug. 28, 1974), slip op. at 3, *discussed in* Baron et al., Organ and Tissue Transplants from Minor Donors in Massachusetts, 55 B.U.L. Rev. 159 (1975).

Section 12P explicitly provides for the continued operation of the mature minor rule. The last paragraph of the statute provides that

> Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve R.

This language should be read as permitting a minor, one of her parents, or someone else on behalf of the child to file a complaint in the Superior Court seeking judicial authorization for proposed abortion surgery. Importantly, such a complaint could be filed *regardless* of whether the parents had been

consulted or had withheld their consent.[30] Since the common law right of a mature minor to consent to surgery is based upon the theory that the child is able to comprehend all the consequences of the procedure, the policies justifying the requirement of parental consent in § 12P do not apply. Therefore, the most harmonious reading of § 12P, from the point of view both of its language and structure and of the policies it seeks to promote, is one which recognizes its consistency with the common law and its implicit incorporation of the mature minor rule. *Cf. Ballard* v. *Anderson*, 4 Cal. 3d 873, 883, 95 Cal. Rptr. 1, 8 (1971).

Section 12P also provides a mechanism, consistent once again with the common law, to protect a child when, because of her incapacity to given informed consent, the mature minor rule is inapplicable. Under § 12P(1) the court is authorized to grant permission for an abortion for "good cause shown." The use of the phrase "good cause" in other statutes in Massachusetts has been interpreted liberally and held to mean, in effect, a rational reason. *See, e.g., Rinaldo* v. *School Committee of Revere*, 294 Mass. 167, 169, 1 N.E. 2d 37, 38 (1936) ("good cause" under school tenure act includes any good faith ground which is not arbitrary, irrational, unreasonable, or irrelevant and is fairly debatable and honestly asserted); *Jenney* v. *Tilden*, 270 Mass. 92, 95, 169 N.E. 669, 670 (1930) ("good cause" in tax redemption statute means that which "in equity and good conscience" should entitle one to redeem); *Raytheon Company* v. *Director of Division of Employment Security*, 344 Mass. 369, 182 N.E. 2d 293 (1962) (quoting with approval *Sturdevant Unemployment Compensation Case*, 158 Pa. Super. 548, 557 (1946), that "good cause" in unemployment compensation statute means "necessitous circumstances . . . ").

[30] Moreover, state equity courts provide for both anonymity of parties and impoundment of court papers. *See, e.g., Doe* v. *Doe*, Mass. Adv. Sh. (1974) 1089, 314 N.E. 2d 128 (1974).

Placed against this background, "good cause" in § 12P(1) appears to mean reasons adequate to persuade a judge, on the basis of traditional equity notions, to authorize the surgery. Paramount among such reasons would be a showing that an abortion is in the minor's best interests. *See Richards* v. *Forrest, supra.* Relevant also would be a lack of any harm to the parents, the availability of a qualified surgeon, and the recommendations of outside experts, including child psychologists and religious counselors.[31] Although phrased in terms which seem to place a burden on the minor, the statute actually authorizes the Superior Court to substitute its judgment for that of a child's parents if equity and good conscience suggest that it should do so.[32]

In summary, § 12P is firmly grounded in the common law tradition and uses three well-established approaches — parental consent, parens patriae, and judicial supervision — in a coordinated effort to help minors make the best possible decision concerning pregnancy. Following the common law tradition, § 12P does not prescribe an outcome. It neither requires nor bars abortion surgery for minors. Rather, it creates a process for decision-making. Defendants believe that this process is faithful to the teaching of the common law and, as such, embodies principles which merit constitutional respect.

[31] It is now well-established that parental religious beliefs cannot be used to justify withholding medical care from children, and any denial based solely upon such a ground could not withstand a showing of a child's desire for an abortion. *See Jehovah's Witnesses in the State of Washington* v. *King County Hospital*, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968).

[32] Section 12P also removes a procedural burden usually imposed on children by relaxing the common law rule, codified in Mass. R. Civ. P. 17(b), that the court must appoint a *guardian ad litem* to represent a minor.

III. The Legislature's Effort to Resolve Compelling Interests by Requiring Parental Consent Subject to Judicial Review is Within the Bounds of the Due Process Clause of the Fourteenth Amendment.

A. *The Statute Preserves the Primacy of the Family Unit by Reinforcing the Role of Parents in Fundamental Decisions Affecting Family Members.*

This Court has stated plainly its view of the parents' role in our society:

> It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Kovacs* v. *Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring).
>
> The Court has frequently emphasized the importance of the family. . . . "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer* v. *Nebraska*, [262 U.S. 390] at 399, the Equal Protection Clause of the Fourteenth Amendment, *Skinner* v. *Oklahoma*, [316 U.S. 535] at 541, and the Ninth Amendment, *Griswold* v. *Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring). *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972).

The Massachusetts Legislature, in enacting c. 112, § 12P, has sought to advance the same basic constitutional values that the state in *Stanley* impinged upon. There, the Court struck down an Illinois statute that automatically deprived an unwed father of the custody of his children following the death of the children's natural mother. The Court held that under the Due Process Clause the father was entitled to a hearing on his fitness as a parent. The Court rejected the irrebuttable presumption created by the statute that unmarried fathers are unqualified to raise their children. 405 U.S. at 653. Such a statute, said the Court, "needlessly risks running roughshod over the important interests of both parent and child." 405 U.S. at 657. Drawing upon the same values as the Court's opinion in *Stanley*, § 12P reflects a belief that protection of minors from acts which may be improvident, unsafe, and, on later reflection, profoundly regretted, rests with those who are naturally best suited to understand and assist a child during a difficult period.[33]

One obvious basis for making parents a party to the abortion decision is the intimate knowledge they possess of their child's struggles with adolescence and the elements of her growth which should be considered at this critical time. Indeed, the district court itself recognized the value of parental involvement:

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[33] Unlike the statute in *Roe* v. *Wade*, 410 U.S. 113 (1973), the provision for parental consent imposes no substantive judgment about the propriety of abortion. In *Roe* the Texas statute prohibited a woman from obtaining an abortion, regardless of the decision she and her physician had made. Here, by contrast, § 12P provides that, when the factors surrounding an abortion are being considered and a decision being reached, a child's parents should play a primary role.

On the propriety of state action viewed as an allocation of the decision-making role to the family, *cf.* Tribe, Foreword: Toward a Model of Roles in the Due Process of Life and Law, 87 Harv. L. Rev. 1, 34-38 (1973).

> All experts agreed that pregnancy in an unmarried minor is a period of great emotional stress; that support is needed, and parental support if forthcoming, is most desirable . . . [W]e believe that most [parents] would wish to know of their daughter's pregnancy, and we may assume that most would seek to be supportive. (A.J.S. 9-10.)

The testimony of witnesses on both sides, excerpted in the margin, reinforces this view.[34]

[34] The plaintiffs' first expert witness, Dr. Sturgis, testified that in "most instances they, the parents, do go along with the doctor" (A. 65). He specifically stated he had never encountered parents who would refuse consent (A. 66). Nor had he known of minors who refused to involve their parents (A. 66). On cross-examination, Dr. Sturgis reiterated that every effort should be made to encourage parental cooperation and involvement (A. 95, 97-98).

Plaintiffs' other expert witness, Dr. Nadelson, substantiated the testimony of Dr. Sturgis. Dr. Nadelson stated:

> [I]t [parental involvement] is extremely helpful and we try very hard to get everybody, the entire family, involved if we can, as many people as can sit down together and talk about it. (A. 92.)

Upon cross-examination, Dr. Nadelson testified that:

> [I]t is very important for a minor to have parental support and somebody with her. It is a very important part of feeling loved and cared about, expecially if the pregnancy occurred in the context of some question about that, and I think it is an important part of building a relationship between teenagers and their parents or between any two people who have to go through a crisis together. It can really strengthen the relationship. (A. 180.)

The court below did not consider a second basis for parental involvement, that parents would want to arrange for their child's termination of pregnancy to take place under optimum medical conditions supplemented by professional counseling sensitive to the child's emotional needs. As one very pertinent illustration, some parents might be justly skeptical about the abortion process followed at the Parents Aid Society. The testimony at trial established that this process was a perfunctory one.

The counseling carried on by the Parents Aid Society occurs entirely on the day the abortion is to be performed (Mary Moe, 158). It lasts for two hours and takes place in groups that include both minors and adults who are strangers to one another (Mary Moe, 141). The physician takes no part in this counseling process (A. 229, 263). Counseling is typically limited to a description of abortion procedures, possible complications, and birth control techniques (A. 263-264; Mary Moe, 141).

The abortion itself takes five to seven minutes (A. 231). The physician has no prior contact with the minor, and on the

Defendants' expert witness, Dr. Yerkes, explained that the abortion decision should be made over a period of at least a week in consultation with a doctor and the minor's parents (A. 339-340). He stated:

> The adolescent, depending upon age, lives in two worlds. One is a world of peers and one is a world of family. In terms of emotionally important people, the family are the oldest. They know the individual the best. They are the people I think should be primarily involved, if at all possible. I feel that the family involvement should be the rule for several reasons. (A. 340.)

As a corollary to this consensus that parental involvement is beneficial, all the witnesses with relevant experience testified further that a minor's fear of adverse parental reaction were usually unfounded. They agreed that once the parents were involved, they worked with the doctor and supported their daughter. A minor's fear of parental reprisals against her or her boyfriend seldom materialized (A. 65, 148, 182-183, 343).

days that abortions are being performed at the Parents Aid Society, the physician, Dr. Zupnick, may be performing abortions on many other adults and minors (A. 240). On busy days patients are scheduled in separate groups, consisting usually of five patients (A. 240). After the abortion Dr. Zupnick spends a brief period with the minor and others in the group in the recovery room (A. 240).

Parents might well determine that their child's needs would be served better by individual private counseling than by group counseling. Moreover, they might wish to seek the services of a doctor with whom they are familiar and to whom the family can return for information and assistance, should the need later arise.[35] With these medical and counseling preferences in mind, parents might reasonably utilize the consent provision in § 12P to direct their daughter to a facility that provides such services.[36] It is in this way that parental participation contributes a mature perspective which is likely to serve the child's physical and emotional needs following her abortion.[37]

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[35] The Court in *Roe* v. *Wade* recognized that a state may "properly assert important interests in safeguarding health [and] in maintaining medical standards." 410 U.S. at 154.

[36] Plaintiffs' own expert, Dr. Carol Nadelson, described a thoughtful and sensitive process provided at Beth Israel Hospital with elements of care and counseling lacking at the Parents Aid Society (A. 169-170, 181).

[37] As Judge Julian stated, in dissent below:

> Parents have rights and responsibilities that inhere in the parent-child relationship and stem from the fact, nature and purpose of parenthood. These rights and responsibilities are not inimical to the minor's rights and welfare. They exist for the benefit of the child and protection during the child's formative years. The state has a compelling interest in protecting the parental rights and duties against unauthorized intrusion by third persons. The statute under attack expresses this compelling interest. (A.J.S. 25.)

Further, parents can assure that their child appreciates all the options available to her. For example, a pregnant minor might initially reject the alternative of giving birth and then providing for the baby's adoption. It may be, however, that this choice would ameliorate the feelings of guilt many minors may later encounter from their decision to terminate pregnancy. At the least, parental counseling can minimize the possibility that the child will follow a path that mature reflection would put aside in favor of another course. A statute that preserves these opportunities for parental participation should not be rejected as facially invalid.

The Court has not had occasion to speak often about the place of the family in our constitutional system, but, when addressed, the primacy of the family unit has been made plain. For example, the Supreme Court has recognized that the values of the family are sufficiently strong in certain contexts to prevent a state from implementing a basic interest, the education of its youth. In *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), the Court overturned the criminal convictions of Amish parents who had refused, contrary to the state's compulsory education law, to send their children to public high school beyond the eighth grade. The Court stated:

> [T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the unbringing of their children is now established beyond debate as an enduring American tradition. 406 U.S. at 232.

In *Yoder* the "primary role of the parents" outweighed the state's basic interest in education.[38] This interest in the parental role is reflected in § 12P and should serve here not to condemn but justify state action. For unlike *Yoder* the Massachusetts Legislature, in enacting § 12P, claims no interest independent of or in conflict with the integrity of the family unit. Rather, it underscores these same family values as among the compelling interests the statute seeks to further. The court below neglected to consider the constitutional dimensions of the family concept and thus found it a deceptively simple matter to strike down the statute.

It is true that in *Yoder* the Court did not consider the potentially competing interests of parent and child. This possibility of conflict is a brooding issue in any judicial treatment of the family unit. In declining the issue the Court stated:

> Our holding in no way determines the proper resolution of possible competing interests of parents, children, and the State in an appropriate state court proceeding in which the power of the State is asserted on the theory that Amish parents are preventing their minor children from attending high school despite their expressed desires to the contrary. 406 U.S. at 231.

The Court presumed that the interests of parents and their children will be in harmony on fundamental questions. But the Court did imply that, were such conflict to exist, parental rights would remain strong. *Ibid.* Moreover, Justice Douglas recognized in his dissent that the appropriate resolution of

[38] See *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954): "Today, education is perhaps the most important function of state and local governments."

such conflict would lie *not* in the Supreme Court's prefering one family member over another, but in providing the child an opportunity to be heard. 406 U.S. at 244-246. The Massachusetts Legislature has afforded precisely this opportunity to pregnant minors in the judicial review provision of § 12P.[39]

In deciding *Stanley* v. *Illinois*, *supra*, and *Wisconsin* v. *Yoder*, *supra*, this Court relied upon three often-cited opinions for the principle that preservation of the family unit is a fundamental interest: *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923).

Prince v. *Massachusetts* provided what was, until this case, the richest context for considering family interests, for in *Prince* these interests collided directly with the state's responsibility for protecting its youth.[40] Moreover, the dispute involved the exercise of religious freedom. Massachusetts had enacted a child labor law prohibiting the sale of magazines and related materials by a minor. The Court affirmed the conviction under this statute of a guardian aunt who had permitted her niece to participate in the distribution of Jehovah's Witness materials. Citing *Pierce* and *Meyer*, Justice Rutledge began by declaring that parental rights carry great constitutional weight:

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter. 321 U.S. at 166.

[39] See Part III, C, *infra*.

[40] See Part III, B, *infra*.

The Court went on, however, to hold that "the family itself is not beyond regulation in the public interest . . . [a]nd neither rights of religion nor rights of parenthood are beyond limitation." *Ibid.* The state's goal of protecting the well-being of its youth through child labor legislation outweighed the asserted private interest. Thus, *Prince* established that even fundamental constitutional interests are subject to carefully drawn state regulation. More recently, the Court in *Roe* v. *Wade* held that a woman's right to an abortion is subject to the same limitation. 410 U.S. at 154.

In this case, the statute seeks to further the interests of the family unit. At the same time its impact on the privacy interest of pregnant minors is not in the outcome of the abortion decision, but the process by which the decision is reached. This limited regulation is a narrowly drawn effort to serve compelling state interests and should be upheld.

B. *The Statute Furthers the State's Compelling Interest in Protecting the Well-Being of its Youth.*

In addition to the state's interest in assuring parental participation in the abortion decision, § 12P advances the well-recognized state interest in protecting the well-being of its youth. *Ginsberg* v. *New York*, 390 U.S. 629, 639 (1968). In this regard the Supreme Court has long held that "[t]he state's authority over children's activities is broader than over like actions of adults." *Prince* v. *Massachusetts*, 321 U.S. 158, 168 (1944). In so holding the Court in *Prince* stated:

> Concededly a statute or ordinance identical in terms with § 69 [prohibiting the sale of magazines by a minor], except that it is applicable to adults or all persons generally, would be invalid. . . . But the mere fact [that] a state could not wholly prohibit this form of adult activity

> . . . does not mean it cannot do so for children. . . . A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection. . . . What may be wholly permissible for adults therefore may not be so for children. 321 U.S. at 167, 168, 169.

The rationales laid down in *Prince* are well-served by the Massachusetts statute. As in other areas of personal concern, the state may reasonably determine that a pregnant minor generally lacks the capacity to make a valid, informed judgment as to the appropriate course to pursue, especially when faced with the fact of her own pregnancy.[41] *See Ginsberg* v. *New York*, *supra*, 390 U.S. at 641-643.

Moreover, the nature of the state's regulation here is far more limited than in *Prince*. There, the Court upheld an outright prohibition on activities prompted by religious belief.[42] Here, process rather than prohibition is the focus. This attempt by the Massachusetts Legislature to strengthen the maturity of the abortion decision, while leaving intact the substantive fundamental interest of the child, deserves the Court's respect.

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[41] The testimony below pointed to the ambivalence minor females experience upon becoming aware that they are pregnant (A. 170).

On the rights of those minors actually capable of a valid consent, see the discussion of the statute's provision for judicial review, *infra*, p. 56.

[42] Justice Jackson, dissenting in *Prince*, pointed out that the Court had held the term before that precisely the same religious activity, sale of religious literature by Jehovah's Witnesses, occupies "the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits." 321 U.S. at 176, citing *Murdock* v. *Pennsylvania*, 319 U.S. 105, 109 (1943).

The Court's recent opinions upholding the constitutional rights of children do not support a contrary result. The three most notable opinions on this issue are *In re Gault*, 387 U.S. 1 (1967), *Tinker* v. *Des Moines Indep. School Dist.*, 393 U.S. 503 (1969), and *McKeiver* v. *Pennsylvania*, 403 U.S. 528 (1970).[43]

In re Gault concerned the impact of the due process requirement on "proceedings by which a determination is made as to whether a juvenile is a 'delinquent. . . .'" 387 U.S. at 13. In reiterating[44] that a juvenile hearing must measure up to the essentials of due process and fair treatment under the Fourteenth Amendment, the Court extended to juvenile proceedings a number of safeguards considered basic to criminal trials of adults. 387 U.S. at 31-59. In clear and simple terms, the Court stated:

> [N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone. 387 U.S. at 13.[45]

Appellants do not challenge this principle, nor do they suggest that it has any less force here than in *Gault*. Rather, appellants submit that this principle is compatible with the notion that the state, in regulating an area touching upon the fundamental interests of children, may take account of the well-recognized differences between minors and adults in their

[43] *See also Kent* v. *United States*, 383 U.S. 541 (1966); *In re Winship*, 397 U.S. 358 (1970); *cf. Goss* v. *Lopez*, 419 U.S. 565 (1975).

[44] *See Kent* v. *United States, supra*, decided the year before *Gault*.

[45] *See also McKeiver* v. *Pennsylvania*, 403 U.S. 528 (1971), in which the Court held that the Due Process Clause of the Fourteenth Amendment does not assure the right to trial by jury in the adjudicative phase of a state juvenile court delinquency proceeding.

capacity for autonomous decision-making. Justice Stewart emphasized this point in his concurring opinion in *Tinker* v. *Des Moines Indep. School Dist.*, *supra*. While agreeing that the First and Fourteenth Amendments precluded public school authorities from prohibiting the wearing of black armbands by students during school hours as an expression of opposition to the Vietnam War, he went on to state:

> I continue to hold the view I expressed in [*Ginsberg* v. *New York*, 390 U.S. 629 (1968)]: "[A] State may permissibly determine that, at least in some precisely delineated areas, a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." 393 U.S. at 515.[46]

Ginsberg v. *New York*, *supra*, reinforces appellants' argument that minors are subject to more restrictive regulation than adults in areas of constitutional concern. There the Court upheld the facial constitutionality of a New York obscenity statute which prohibited the sale to minors of material defined as obscene on the basis of its appeal to them although the same material could not be defined as obscene to adults.[47]

[46] This concurrence was cited with approval by the Court in *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 214, n. 11 (1975).

[47] Appellants recognize that, because the elusive concept of obscenity was under analysis in *Ginsberg* generalization to other areas of constitutional concern becomes a delicate task. Obscene material, once defined as such, loses the constitutionally protected status afforded other forms of speech. In *Ginsberg*, the written matter had protected status vis-a-vis adults, but lost that status when associated with minors. This calls into question whether in *Ginsberg* the child's fundamental interests were directly involved. Appellants submit that, whatever the resolution of this conceptual conundrum, the Court's primary theme in *Ginsberg*, the distinction between adults and minors, supports the analogy drawn in the text of the brief.

First quoting *Prince* v. *Massachusetts*, 321 U.S. 158, 170 (1944), to the effect that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults," *Ginsberg* at 638, the Court in *Ginsberg* went on to hold:

> The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations . . . upon the availability of sex material to minors under 17, at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful. First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. . . . The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility. . . .
>
> The State also has an independent interest in the well-being of its youth. . . . "It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults." [Quoting Fuld, J., in *People* v. *Kahan*, 15 N.Y. 2d 311, 206 N.E. 2d 333 (1965).] 390 U.S. at 639-640.[48]

[48] *See also* Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 939 (1963):

> Different factors come into play, also, where the interest at stake is the effect of erotic expression upon children. The world of children is not strictly part of the adult realm of free expression. The factor of immaturity, and perhaps other considerations, impose different rules. (Quoted in *Ginsberg*, 390 U.S. at 638.)

These same interests in protecting youth are reflected in § 12P. Taken together, the State's preservation of the child's well-being and its support of the family unit compel the conclusion that the statute is facially valid under the Fourteenth Amendment.

C. *Because the Statute's Provision for Judicial Review can be Administered to Preserve the Pregnant Minor's Independent Privacy Interest, the Lower Court's Finding of Facial Invalidity was Unwarranted.*

Appellants have taken as a tacit premise throughout their argument that the right of privacy, held in *Roe* v. *Wade*, 410 U.S. 113, 153 (1973), to be part of the Fourteenth Amendment, extends to minors as well as adults. *See In re Gault*, *supra*. However, as stated above, pp. 51-52, the minor's possession of a fundamental privacy interest does not foreclose narrowly drawn state regulations designed to serve compelling interests. Here, the State, by including a right of review, has paid heed to the need for careful draftmanship. If § 12P provided no recourse for a pregnant minor who found herself locked in dispute with her parents over the abortion decision, constitutional problems might exist.[49] For in that situation it might be argued that the statute categorically required that parental judgment be preferred to the privacy interest of minors. The court below apparently concluded that this categorical preference was a central feature of the law. Thus, the district court said:

[49] For example, contrast the parental consent statutes struck down in *State* v. *Koome*, 84 Wash. 2d 901, 530 P. 2d 260 (1975), *Poe* v. *Gerstein*, 517 F. 2d 787 (5th Cir. 1975) (Florida), *Foe* v. *Vanderhoof*, 389 F. Supp. 947 (D. Colo. 1975), none of which provides the minor an explicit opportunity to be heard in state court.

> The parents not only must be consulted, they are given a veto. Defendants do not like this word. The fact, however, that because of the right of appeal this veto may not be absolute, modifies it only to a degree. So long as parents' independent rights may be enforced, they remain formidable. (A.J.S. 15.)

This conclusion fails to analyze how the state courts may actually administer the statute. Standards of review have already been fashioned for similar disputes which, if applied here, would preserve the statute's constitutionality.

The judicial review provision reads as follows:

> If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother.

Reversal of the district court's findings of facial invalidity is warranted if this Court can realistically foresee an application of this provision that will bring § 12P within constitutional boundaries. *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 216 (1975). As the Court has consistently held in the First Amendment area:

> Application of the overbreadth doctrine . . . is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has

> been or *could be* placed on the challenged statute.[50] (Emphasis supplied.) *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973). *See also Dombrowski* v. *Pfister*, 380 U.S. 479, 497 (1965).

Three considerations in this case related to narrow statutory construction militate in favor of reversal. First, the defendants in this proceeding are offering justifications for the statute predicated on a narrow construction. These defendants are the attorneys responsible for enforcement of the criminal laws of the Commonwealth, including § 12P. There is thus good reason for the Court to believe that, in its enforcement, the statute will be decisively narrowed. *See Erznoznik* v. *City of Jacksonville*, 422 U.S. at 217, *Grayned* v. *City of Rockford*, 408 U.S. 104, 111-112 (1972).

Second, the Massachusetts Supreme Judicial Court recently has made clear its solicitude for the privacy interest articulated in *Roe* v. *Wade*. In 1974 that court held that a woman's right to terminate her pregnancy was not subject to a countervailing right in the father to prevent the abortion. *Doe* v. *Doe*, Mass. Adv. Sh. (1974) 1089, 314 N.E. 2d 128 (1974). The court stated that it found "no basis for the husband's assertion that the Constitution enables him to summon the Commonwealth to help him in a dispute with his wife." 314

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[50] *Broadrick* also points out that:

> [O]verbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner. See *United States* v. *Harriss*, 347 U.S. 612, [625-626] (1954); *United States* v. *C.I.O.*, 335 U.S. 106 (1948). *Broadrick* v. *Oklahoma*, *supra*, 413 U.S. at 614-615.

Appellants have argued elsewhere, pp. 41, n. 33, 48, 49, that § 12P does not "censor," but rather prescribes a process for the minor's abortion decision. Here, too, standards for facial scrutiny should be "less rigid."

N.E. 2d at 130. One can thus predict with some assurance that the Supreme Judicial Court will permit the statute to operate *only if* constitutional limits can be carved out of its terms. In these circumstances, a finding of facial invalidity is inappropriate. *See, e.g., Gooding* v. *Wilson*, 405 U.S. 518, 520-527 (1972).[51]

The third basis for a narrowing construction is the availability of common law standards in analogous areas which, if applied here, will assure that the child's privacy interest is given its proper weight. These standards are (1) the "mature minor" rule and (2) "the happiness and well-being of the child."

The mature minor rule represents a response by the common law to the fact that certain minors have sufficient capacity to appreciate the medical and emotional implications of surgical procedures. In these circumstances, the rationale for parental consent ceases, and state courts have given effect to the minors' decision. *See, e.g., Rappeport* v. *Stott*, Civil Action No. J 74-57 (Mass. Sup. J. Ct., Aug. 28, 1974) (unreported case). This rule should meet the objection of the district court that "a substantial number of females under the age of 18 are capable of forming a valid consent" (A.J.S. 12). These are the very females who may be able to use the rule to establish "good cause" for obtaining consent from the Superior Court in the face of parental objection.

The other standard designed to protect the child states that parental rights "will not be enforced to the detriment or

[51] *See also Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496, 500 (1941):

> Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, [where] the policy relates to . . . the final authority of a state court to interpret doubtful regulatory laws of the state.

destruction of the happiness and well being of the child." *Purinton* v. *Jamrock*, 195 Mass. 187, 201, 80 N.E. 802, 805 (1907). This standard has deep roots in the common law and may well be absorbed into § 12P as the primary meaning of the term "good cause." Thus interpreted, the statute would permit the Superior Court to substitute its judgment for that of the parents if equity requires. See pp. 38-39, *supra*.

When a state statute that serves important interests provides an opportunity for a narrowing construction, the fundamental premises of our constitutional system demand that the Court stay its hand. As this Court has declared in a comparable context, such a result reinforces

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This . . . is referred to by many as "Our Federalism." . . . What the concept . . . represent[s] is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. *Younger* v. *Harris*, 401 U.S 37, 44 (1971).

The idea of federalism expressed in *Younger* involves more than a technical rule. It counsels an attitude of restraint for

federal judges.[51] Their solicitude for personal interests should be tempered by a recognition that others share this solicitude as well as the responsibility for protecting these same interests. To ignore the possibilities of a narrowing interpretation here would be tantamount to an "assumption that state judges will not be faithful to their . . . responsibilities" to abide by the Federal Constitution. *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 611 (1975). These principles render inappropriate a finding of facial invalidity.

IV. Because the District Court Ignored the Requirements of Rules 17(c) and 19(a) of the Federal Rules of Civil Procedure, it Reached a Decision Uninformed by the Actual Views of Persons Significantly Affected by the Outcome.

A. *Fed. R. Civ. P. 19(a) Required the Joinder of Mary Moe's Parents.*

Fed. R. Civ. P. 19(a) provides that:

> (a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not

[51] For a listing of analogous situations calling for an attitude of restraint, *see Ashwander* v. *T.V.A.*, 297 U.S. 288, 347, 348 (1936) (Brandeis, J., concurring), e.g.:

> 4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . .
>
> 7. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. . . ."

> deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. . . .

This provision sets forth three criteria which, if satisfied, classify a person as one required for a just adjudication. First, the person must be subject to service of process. Second, the person's joinder must not divest the court of subject matter jurisdiction. Third, the person must either be essential to the provision of complete relief or claim an interest in the action which may be adversely affected as a practical matter or may prejudice the interests of persons already parties. Persons who are thus situated are, in traditional terms, "necessary" parties, and Rule 19(a) requires their joinder. *Smith* v. *American Federation of Musicians of the United States and Canada*, 46 F.R.D. 24, 28 (S.D. N.Y. 1968); *Muir* v. *United States Steel Corp.*, 41 F.R.D. 428, 430 (E.D. Pa. 1967); 7 C. Wright and A. Miller, Federal Practice and Procedure § 1604 (1972); 3A J. Moore, Federal Practice ¶19.19 (1974).

Mary Moe's parents clearly satisfied these three criteria.[53] The district court determined that Mary Moe was a resident of Massachusetts living at home with parents (A.J.S. 3). On this record, particularly in light of appellees' failure to provide the information required under Rule 19(c), it is reasonable to assume that the parents were subject to service of process. Further, their joinder would not have divested the court of subject matter jurisdiction, since jurisdiction was founded on 28 U.S.C. § 1343(3) and was therefore independent of the citizenship of the parties. Finally, the parents were unable to claim their interests because the proceedings were secret[54] and they were seriously and adversely affected by the district court's judgment.

Mary Moe's parents have the foremost interest in their child's health and welfare. This interest is recognized by both the Constitution and the common and statutory law of the Commonwealth. See pp. 25-32, *supra*. The district court, by failing to order joinder even after plaintiff Zupnick had performed an abortion on Mary Moe, effectively foreclosed her parents from taking any steps to express their own views on

[53] Appellants make this statement on the basis of supposition, since appellees did not comply with the requirements of Rule 19(c) and the true situation thus remains a secret. Federal courts have stated that supposition is appropriate to prevent plaintiffs from foreclosing argument under 19(c) on account of their own failure to provide the information Rule 19(c) requires. *See Stevens* v. *Loomis*, 334 F. 2d 775, 776 n. 1 (1st Cir. 1964) (court assumed truth of defendants' allegations concerning persons needed for just adjudication under pre-1966 version of Rule 19(a), absent plaintiffs' compliance with Rule 19(c)).

[54] The secrecy of the proceedings also prevented the parents from exercising their rights under Fed. R. Civ. P. 20 and 24. This complete foreclosure of the right to notice and an opportunity to be heard raises serious constitutional questions. *See* Julian, J., dissenting, A.J.S. 18-21; *cf. Joint Anti-Fascists Refugee Committee* v. *McGrath*, 341 U.S. 123, 161-174 (1951) (Frankfurter, J., concurring).

the issue under analysis. As a practical matter, Mary Moe's parents will never be able to question plaintiff Zupnick's actions, pursue him for damages should his care prove inadequate, or litigate the question of whether he had a duty under the common law to involve them in his activities.[55] Not only are Mary Moe's parents unaware that the district court compromised their interests, but should they ever discover that it has, practical problems of time, expense, and the unavailability of witnesses stand as virtual bars to the commencement of a future action to vindicate their rights.

The purpose of Rule 19(a) is to prevent such unnecessary frustration of an affected person's right to participate in judicial decision-making. *See Mallow* v. *Hinde*, 25 U.S. (12 Wheat.) 193, 198 (1827); *Shields* v. *Barrow*, 58 U.S. (17 How.) 130, 139 (1855); *Provident Tradesmens Bank and Trust Co.* v. *Patterson*, 390 U.S 102 (1968). The Rule embodies the basic principle that persons whose rights are affected by judicial action must be given notice and an opportunity to be heard. Reflecting the fundamental dimensions of this requirement, Rule 19(a) vests no discretion in a district court to refuse to order joinder of persons who satisfy its three criteria. Nowhere in the district court's opinion does it offer a justification of its refusal to follow the Rule.

B. *The District Court Abused its Discretion by Failing to Appoint a Guardian Ad Litem for Mary Moe under Fed. R. Civ. P. 17(c).*

The defendants requested the district court to appoint a *guardian ad litem* for Mary Moe I pursuant to Fed. R. Civ. P. 17(c). The Rule states:

[55] For example, the common law may require parental consultation at some point in the postoperative care process. *Cf. State* v. *Koome*, 84 Wash. 2d 901, 530 P. 2d 260 (1975) (state might constitutionally require parental *consultation*).

> The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

The majority refused defendants' request based upon the following finding:

> Mary Moe is of ample intelligence to, and in fact does, fully understand the nature of this action and has voluntarily participated therein. Her interests in the facial interpretation of and effect of the statute are fully represented by her competent counsel, and to the extent that there may be thought to be any conflicting interests, by the action of competent counsel for the intervening parent. (A.J.S. 3-4 n. 5.)

The findings of the majority failed to take into account the inherent potential for conflict among the parties and the need for an independent guardian to protect the interests of the minor.

The interests of plaintiffs Zupnick, Baird, and Parents Aid Society were in the continued performance of abortions, which would be curtailed by the enforcement of the statute. Each of these parties, directly or indirectly, obtained fees for the performance of abortions (A.J.S. 6, 22-23) and therefore have financial interests in the outcome of the litigation. In contrast, the interest of a pregnant minor, as represented by Mary Moe I, is not based upon financial gain or potential subjection to criminal penalties. Her interest lies in making a decision which will further her emotional and physical well-being. So long as there are sound alternatives to abortions

performed by the Parents Aid Society, there remains a serious conflict between Mary Moe and all the other plaintiffs.

Although the appointment of a *guardian ad litem* is not mandatory, the district court should decline to appoint one only after a judicial determination that the minor's interest will be protected without a guardian. *Roberts* v. *Ohio Casualty Ins. Co.*, 256 F. 2d 35, 39 (5th Cir. 1958). Moreover, counsel for a minor does not automatically qualify as a *guardian ad litem*. *Zaro* v. *Strauss*, 167 F. 2d 218, 220 (5th Cir. 1948). By relying on the counsel retained by the other plaintiffs, the majority improperly equated the role of legal representation with that of guardianship.

Other federal courts have recently taken a more sensitive approach to the need for a guardian. In *Noe* v. *True*, 507 F. 2d 9, 11-12 (6th Cir. 1974), involving the constitutionality of a state statute prohibiting the State Department of Human Resources from consenting to abortions of minors under its guardianship, the court stated:

> We hold that the district judge erred here in failing to consider and rule upon the guardian ad litem question. We deem the issue particularly critical in this case, where the legal issues are controversial in nature, the plaintiff is a minor, pregnant out of wedlock, without the benefit of a natural parent or guardian, and where her legal guardian is the defendant in the lawsuit. . . . Moreover, since the respective *legal* positions of the child and guardian are adverse in this lawsuit, it cannot be said that the plaintiff is "otherwise represented" in the action as provided in Rule 17(c). While it would not be at all improper for the court, upon consideration, to appoint the child's attorney as her guardian ad litem, the mere presence of an attorney representing her in the action is insufficient of itself to protect her personal interests in the

> action. We stress the obligation of the trial judge to exercise his discretion, bearing in mind the very real need of a 14-year-old plaintiff to have her own personal rights and interests protected. (Emphasis in opinion.)

Cf. Horacek v. *Exon*, 357 F. Supp. 71, 74 (D. Neb. 1973).[58]

The district court majority failed to consider that, when it is addressing complex and sensitive issues such as a minor's abortion, each interested person deserves both independent guidance and strong representation. "[A] court must rely on the parties' treatment of the facts and claims before it to develop its rules of law." *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 221 (1974). Such reliance becomes critical when, as here, important interests with far-reaching effects on family and society are at stake. *Cf. United States* v. *Johnson*, 319 U.S. 302, 304-305 (1943). The majority's refusal to involve Mary Moe's parents or to appoint a *guardian ad litem* disserved the judicial process by reducing the court's analysis to inadequately narrow dimensions.

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[58] The situation in *Foe* v. *Vanderhoof*, 389 F. Supp. 947 (D. Colo. 1975), which the majority cites as authority for refusing to appoint a *guardian ad litem*, presented considerations wholly lacking in the case of Mary Moe. There, the minor already had the assistance of her social worker and doctor. Moreover, the court appointed an independent obstetrician and psychiatrist to examine and counsel the pregnant minor. These elements were absent in this case.

Conclusion.

For the reasons presented above, the order of the district court should be reversed.

Respectfully submitted,

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